2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 3

CRIMES & DEFENSES

Table of Contents

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CRIMES & DEFENSES

Outline of Instruction

I. INTRODUCTION.

II. CONVENTIONAL OFFENSES.

A. Homicide.

1. "Born Alive" Rule. *United States v. Nelson*, 53 M.J. 319 (2000). The UCMJ does not define "human being" for purposes of Articles 118 and 119, but Congress intended those articles to be construed with reference to the common law. A human being, at common law, must have been "born alive." Under the modern common law view, a child is "born alive if it: (1) was wholly expelled from its mother's body, and (2) possessed or was capable of an existence by means of a circulation independent of that of the mother. Even if the child never took an efficient breath of air from its own lungs, the child's capability to do so is sufficient. The court rejected the Navy court's adoption of a "viability outside the womb" standard to determine whether an infant was "born alive."

2. Involuntary Manslaughter. *United States v. Nelson*, 53 M.J. 319 (2000). Failure of a mother to provide medical assistance and to take steps to ensure medical treatment was available for her newborn infant, resulting in the death of the infant, constituted involuntary manslaughter. The accused concealed her unplanned pregnancy. While on board her ship in its home port, she delivered a full term baby girl. Although medical personnel were on board and a number of people walked nearby, the accused sought no assistance. Without evaluating the condition the newborn infant, the accused place her on a bed, covered her with a blanket, and cut the umbilical cord with a pocket knife. The accused placed the baby in a plastic bag with holes in it, and she carried the bag off the ship. She did not check on the child for over an hour. Twelve hours after the birth, the accused went to an Italian civilian hospital, but the baby was already dead. The child likely died of primary apnea, the failure to take an efficient first breath of air, which is a condition easily corrected with simple stimulation. Evidence of the accused's conscious decision to not invoke medical assistance during her pregnancy or childbirth together with her lack of attentiveness to the health or medical condition of the child for over an hour was legally sufficient to support a finding of culpable negligence. A reasonable factfinder could have found that the death of the child was a foreseeable consequence, even though it was not necessarily a natural or probable consequence.

3. *United States v. Riley*, 52 M.J. 825 (A.F. Ct. Crim. App. 2000). Evidence that the accused stuffed a paper towel into her newborn daughter's mouth to muffle any cries and then applied force to the infant's skull, which resulted in a fatal head injury, was sufficient for a conviction of involuntary manslaughter by culpable negligence.

B. Assault with Intent to Commit Murder. *United States v. Odom*, 53 M.J. 526 (N.M. Ct. Crim. App. 2000). The offense of assault with intent to commit murder, under Article 134, requires a specific intent to kill. An intent only to inflict grievous bodily harm in not sufficient. The portion of the instructions in which the military judge stated that the accused must have had the specific intent to kill *or inflict great bodily harm* was plain error. The Navy court set aside the conviction for this offense, but it affirmed the lesser-included offense of assault in which grievous bodily harm is intentionally inflicted, in violation of Article 128.

C. Assault Consummated by a Battery. *United States v. Johnson*, 54 M.J. 67 (2000). Staff Sergeant Johnson, the accused, was SPC C's squad leader in the band at Fort Drum. She considered the accused a friend. They had engaged in consensual hugs, tickling, and punching fights. The accused rubbed her back while she typed and did other work. She did not like the backrubs, because they interrupted her work and made her feel uncomfortable. She shrugged to get out of the backrubs. Sometimes the accused stopped, but sometimes he rubbed a little more. She never specifically told him to stop, because she did not want to draw attention to herself in the office. Where there was a friendly relationship with numerous other types of touching that were not offensive and the alleged victim never protested against the backrubs, the evidence was legally insufficient to support a conviction for assault consummated by a battery. The government failed to prove that the accused was on notice of lack of consent.

D. Robbery. *United States v. Szentmiklosi*, 52 M.J. 639 (Army Ct. Crim. App. 2000). When the same property is wrongfully taken from two different victims, each with greater possessory right in the property than the accused, two robberies are committed. The accused and a co-conspirator took $36,700 in cash from and physically injured both an AAFES courier and his MP escort. The accused was charged with a separate robbery for each victim. The military judge denied a motion to dismiss one of the specifications on the basis of double jeopardy or unreasonable multiplication of charges, and the accused unconditionally pled guilty to both specifications. In an exercise of judicial discretion, the Army court did not decide the issue on the basis of waiver. Robbery is a compound offense consisting of an assault and a larceny. Under these facts, there were two assaults and one larceny. The more egregious aspect of robbery, however, is the assault component. In crimes of violence against a person, the permissible unit of prosecution is the number of victims. The accused committed two robberies.

E. Kidnapping. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). The voluntariness of the seizure and detention is the essence of the offense of kidnapping. The duration of the restraint is not germane, except for sentencing purposes. During an argument, the accused's girlfriend jumped out of the accused's truck and started to walk home. The accused pursued her, grabbed her, carried her back to his truck, and threw her in it. He drove to an isolated park where they argued, and then he drove her home. The victim did not tell the accused she wanted to go home and did not try to get out of the truck a second time, but there is no such requirement under the law. Once the accused carried the unwilling victim back to his truck, the offense of kidnapping was complete.

F. Threat.

1. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). Evidence that the accused got angry at his former girlfriend for ignoring him, hit her in the head with a metal cooking pot, grabbed her by the throat and lifted her off the floor, held her against the wall with one hand, pulled his fist back as if to hit her, said that he could punch her nose into her brains and kill her, and then punched the wall next to her head was sufficient to support a conviction for communicating a threat. His acts and words expressed what he could and would do in the future if she did not acquiesce to his will.

2. *United States v. Hall*, 52 M.J. 809 (N.M. Ct. Crim. App. 1999). The Navy-Marine court held that the following evidence was sufficient to support a conviction for communicating a threat: the accused and victim exchanged heated words and had to be constrained from fighting each other a few minutes earlier; the accused followed the victim to a barracks parking lot; the accused angrily paced back and forth staring at the victim, despite efforts by others to calm him down; and the accused said loud enough for the victim to hear him, "He don't know how bad I want to shoot him. I want to shoot that nigga. You know, I want – you know, I just want to take him out or whatever". In determining whether words expressed a present determination or intent to wrongfully injure, the language used and the surrounding circumstances should be considered. In this case, the court did not consider the fact that the accused retrieved a pistol from his room, because it occurred after he spoke the words of the alleged threat.

G. Sex Offenses.

1. Rape.

a. *United States v. Grier*, 53 M.J. 30 (2000). If a victim is incapable of consenting because she is asleep or unconscious or intoxicated to the extent that she lacks the mental capacity to consent, then the act of sexual intercourse is done without consent and no greater force is required than that necessary to achieve penetration.

b. *United States v. Tollinchi*, 54 M.J. 80 (2000). Sergeant Tollinchi, the accused, was a recruiter. He provided alcohol to a Marine recruit and his 17-year-old girlfriend, encouraged them to engage in sexual activity with each other, and then engaged in several sexual acts with the recruit's girlfriend. The accused was convicted of rape, sodomy, attempted sodomy, two specifications of indecent assault, adultery, and two specifications of violating a general order. Where the alleged victim was aware that the accused was going to penetrate her and she did nothing to express to him her lack of consent, the evidence was legally insufficient to support a conviction of rape. The court affirmed all the convictions except for rape, and it affirmed rape's lesser-included offense of indecent acts for engaging in sexual intercourse in the presence of a third person.

2. Indecent Assault. *United States v. Ayers*, 54 M.J. 85 (2000). Staff Sergeant Ayers was an Initial Entry Training instructor at Fort Lee. He was convicted of two indecent assaults based on the testimony of a trainee, PFC TH. After bed check, PFC TH agreed to meet the accused, and she was a "willing participant" when the accused touched her face, breasts, and buttocks and kissed her. When the accused tried to progress to sexual intercourse by touching her vagina with his penis, she told him she did not want to have sex. He tried to persuade her by telling her to relax, and he continued to touch her vagina with his penis. She persisted in her refusal, and the accused stopped and left the room. In her testimony, PFC TH described it as "when a guy tries to get as far as he can, but it doesn't go anywhere." The court held that the evidence was legally insufficient for indecent assault, because the government failed to prove lack of consent. There was no unwanted sexual touching. The court found that PFC TH drew the line at sexual intercourse, and the accused did not cross that line.

After the incident in the conference room, PFC TH continued the relationship by calling the accused. She agreed to meet him. He touched her face, and he tried to kiss her and touch her buttocks. Her feelings for the accused had changed, and she did not want him to touch her. She backed away, and the accused stopped and left the room. The defense theory was that PFC TH's testimony was "total lurid fiction." The court held that the evidence was legally insufficient for indecent assault. Once PFC TH indicated she did not consent, the accused stopped.

3. Sodomy.

a. *United States v. Allen*, 53 M.J. 402 (2000). Any constitutional right to engage in sexual relations within a marital relationship must bear a reasonable relationship to activity that is in furtherance of the marriage. As part of a pattern of abuse, the accused beat his wife, solicited her to prostitute herself, and anally sodomized her. Prior to the assaults, she had refused anal sodomy, because she was forcibly sodomized as a teenager. After the abuse, she reluctantly allowed the anal sodomy. Under these facts, the sexual act was not in furtherance of the marriage, so the conviction for anal sodomy with his former wife did not violate the accused's constitutional right to privacy.

b. *United States v. Green*, 52 M.J. 803 (N.M. Ct. Crim. App. 2000). The victim's testimony that the accused's head was between her legs, his hands were on her thighs, her legs were spread apart, his mouth was on her vagina, he performed "oral sex," and he "was in between" her was sufficient to prove penetration for the offense of sodomy, under Article 125.

4. Indecent Acts with a Child. *United States v. Thrower*, 53 M.J. 705 (C.G. Ct. Crim. App. 2000). The accused's pushing a ten-year-old girls's head onto his lap, stroking her head and hair, and preventing her from lifting her head, all done with the intent to arouse him sexually and actually having that effect, constituted an indecent act with a child, under Article 134.

5. Indecent Liberties with a Child. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to and was convicted of separate specifications of indecent liberties with each child. The Navy-Marine court adopted a "different victims" standard as the unit of prosecution for indecent liberties, because the purpose of the offense is the protection of the individual person. Thus, each offense against a different victim, even when the underlying conduct for each offense is the same, is a separately punishable crime.

H. Crimes Against Property.

1. Larceny.

a. BAH Larceny. *United States v. Phillips*, 52 M.J. 268 (2000). When Congress authorized basic allowance for housing for service members with "dependents," it did not intend to include a person linked to a service member only by a sham marriage. A marriage, as intended by Congress, is an undertaking by two parties to establish a life together and assume certain duties and obligations. A marriage entered into solely for the purpose of obtaining government benefits is a sham marriage.

b. Larceny of Multiple Items.

(1) *United States v. Miller*, 53 M.J. 128 (2000) (summary disposition). The contemporaneous theft of two different victims' checks, which the accused found in one of the victim's drawer, constituted a single larceny.

(2) *United States v. Harris*, 53 M.J. 514 (N.M. Ct. Crim. App. 2000). Where a single act results in the theft of multiple items of personal property, the government can only charge one larceny. Where two checks were stolen from the same page of a ledger and there was no evidence of when the checks were stolen, the court found that the checks were both taken at the same time and consolidated two specifications into one specification.

(3) *United States v. LePresti*, 52 M.J. 644 (N.M. Ct. Crim. App. 1999). The accused fraudulently used another person's credit card to make one order of several auto parts, which were delivered to the accused on two different days because of a back order. The accused was found guilty of two separate specifications of larceny. The Navy-Marine court consolidated them. It held that a single larceny should be charged if: (1) the accused intended to steal several items; (2) the larceny was committed by a single act of fraud; and (3) the owner delivered the items at different times or dates.

c. Credit Card Larceny.

(1) *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). An intent, at the time of the theft, to pay for or replace the property is not a defense. Where accused forged credit card applications and used the credit cards to purchase merchandise, with the intent to permanently keep the merchandise but pay for it, the plea of guilty to larceny of the merchandise was provident.

(2) *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App. 2000). Taking money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount, does not constitute larceny. The accused stole another person's CityBank Visa card and used it to purchase food and jewelry. Because the accused claimed that he intended to pay the Visa bill in full when due, the plea of guilty to larceny of funds from CityBank was improvident. The court affirmed the lesser-included offense of wrongful appropriation.

d. *United States v. Fenner*, 53 M.J. 666 (A.F. Ct. Crim. App. 2000). The accused was the sole lessee of a house. He shared the house with three roommates, who each paid him $225 toward the rent and utilities. After his roommates paid him one month, he told them that someone had stolen all the money, which was a lie. Each of the roommates agreed to pay an extra $75 per month for the next three months to replace the stolen money. The court set aside a conviction of larceny of the initial payments that were not actually stolen. Once the payments were given to him, he became the sole owner of that money, and it was legally impossible for him to steal it from himself. The court did affirm, however, the part of a separate specification that alleged larceny of $75 that one of the roommates paid the accused toward the supposedly stolen rent. The accused did not own that money. The roommate paid the accused $75 under the false pretense that the money had been stolen.

2. Forgery.

a. *United States v. Sherman*, 52 M.J. 856 (Army Ct. Crim. App. 2000). Where the accused and co-conspirator opened savings accounts by falsely and fraudulently signing signature cards, the general bookkeeping, security, and insurance functions inherent in agreeing to maintain a bank account imposed sufficient legal liability on the banks to warrant forgery convictions, even where there was no initial deposit.

b. *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). A credit application itself is not susceptible of forgery under Article 123, because it, if genuine, would not create any legal right or liability on the part of the purported maker.

I. Offenses Against the Administration of Justice.

1. Obstruction of Justice. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). An accused can be convicted of obstruction of justice, even if the court-martial acquits him of the offense for which he was under investigation.

2. False Official Statement. *United States v. Nelson*, 53 M.J. 319 (2000). The court had previously, in *United States v. Solis*, 46 M.J. 31 (1997), rejected the application of the "exculpatory no" doctrine to Article 107 and held that statements to investigators could be prosecuted as false official statements. Paragraph 31c(6)(a) of Part IV of the MCM, however, provides that "[a] statement made by an accused or suspect during an investigation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak." Because it is not based on the statutory elements of Article 107, however, it does not impose on the prosecution the affirmative obligation to prove such an independent duty. As it did in *Solis*, the court has refused to decide whether this Manual provision is a procedural right that the accused can invoke or internal guidelines to regulate government conduct that the accused can not invoke. Because the accused did not assert the Manual provision at trial, she did not preserve the issue of whether an accused can invoke the Manual provision to defend against a charge under Article 107.

3. False Official Statement. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). When AFOSI agents asked the accused, whom they suspected of threatening victims with guns and whose apartment they intended to search, whether his firearms were in his apartment, there was a clear governmental function underway. The accused's false statement to the investigators about the location of the firearms was a false official statement, under Article 107.

4. False Swearing. *United States v. Galchick*, 52 M.J. 815 (A.F. Ct. Crim. App. 2000). The enumerated Article 134 offense of false swearing, as defined by the President in the Manual, does not include statements made in a "judicial proceeding or course of justice." The Manual defines "judicial proceeding or course of justice" as including Article 32 investigations. The accused, during his Article 32 investigation, took an oath swearing to the truth of a previously prepared written statement and submitted it to the IO. The government preferred an additional charge of false swearing based on that statement. The Air Force court found the evidence legally insufficient to support a conviction for false swearing.

5. Apprehension and Confinement.

   a. *United States v. McDaniel*, 52 M.J. 618 (Army Ct. Crim. App. 1999). Once lawfully ordered into confinement, unless released by proper authorities, a soldier may be convicted of escape from confinement, regardless of the nature of the facility in which he is held. After preferring charges, the accused's commander ordered the accused into pretrial confinement. The military magistrate found that continued pretrial confinement was warranted. While waiting for transportation to the Regional Confinement Facility at Fort Knox, the accused was held overnight in the company training room on Fort Campbell, under guard and in leg irons. At 0400 hours, he slipped off his leg restraints and escaped through the window of the training room. The plea of guilty to escape from confinement was provident. The accused was under physical restraint, as required for escape under Article 95, and the escape was from confinement rather than custody because of the accused's status at the time.

   b. Fleeing Apprehension. *United States v. Pritt*, 54 M.J. 47 (2000). The effective date of the amendment to Article 95, which created the offense of fleeing apprehension, was the date of its enactment, 10 February 1996.

c. Resisting Apprehension. *United States v. Diggs,* 52 M.J. 251 (2000). The prosecution must prove that the accused had "clear notice of the apprehension." SGT (E-5) V. saw his wife emerge partially clad from their bedroom, and he found the accused, SSG (E-6) Diggs, cowering naked in their bedroom closet. SSG Diggs admitted his wrongdoing and stated that he would turn himself in. SGT V. replied, "Yes, he was caught and, yes, he was going to come with me and we both were going to go to the MP station together." The CAAF found the evidence to be legally sufficient, because a rational factfinder could find beyond a reasonable doubt that the accused had clear notice of his apprehension by SGT V.

J. Drug Offenses. *United States v. Manley*, 52 M.J. 748 (N.M. Ct. Crim. App. 2000). The Navy-Marine court refused to follow the rationale of *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977). In *Swiderski*, the defendant and his finacée were both convicted of possessing cocaine with the intent to distribute it. They had purchased the cocaine together, and the cocaine was in his finacée's purse when they were apprehended in his van. The Second Circuit had held that a statutory "transfer" could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use. In this case, the accused was convicted of three specifications of distributing cocaine and two specifications of introduction with the intent to distribute. The court factually distinguished all but one distribution specification from *Swiderski*. The facts surrounding that specification were that the accused and two other sailors went to Tijuana, Mexico. The accused and one of the other sailors purchased cocaine, and the accused carried it back to the other purchaser's barracks room. The accused cut the cocaine, and all three sailors snorted a line. Although the court did not factually distinguish the distribution to the other purchaser from *Swiderski*, it did not apply to rationale of *Swiderski* to these facts, because the Court of Military Appeals declined the invitation to apply the *Swiderski* rationale to a far more compelling set of facts in *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992).

III. THEORIES OF CRIMINAL LIABILITY AND INCHOATE CRIMES.

A. Attempt. *United States v. Rothenberg*, 53 M.J. 661 (A.F. Ct. Crim. App. 2000). An attempt, under Article 80, requires an act that goes beyond mere preparation and amounts to a substantial step and a direct movement toward the commission of the intended offense. Merely soliciting another to commit an offense is not sufficient to constitute an attempt. In this case, the accused pled guilty to attempted distribution of ecstasy. The record established that, at an off-base club, a known ecstasy dealer asked the accused if he wanted any ecstasy. The accused turned and asked his friend, whom he knew had used ecstasy in the past, if he wanted any. The accused had money and would have purchased ecstasy and given it to his friend for cost, but his friend declined the offer. The Air Force court found that, as a mater of law, the acts unambiguously failed to establish a direct movement toward the commission of distribution of ecstasy. It held that the guilty plea to attempted distribution was improvident, but it affirmed a conviction of solicitation to possess ecstasy.

B. Conspiracy.

1. Bilateral Theory. *United States v. Valigura*, 54 M.J. 187 (2000). The CAAF rejected the "unilateral" theory of conspiracy and adhered to the traditional "bilateral" theory of conspiracy. Conspiracy, under Article 81, requires a "meeting of the minds" to achieve the purported criminal goal. Where the accused agreed to and did sell marijuana to an undercover government agent, the accused is not guilty of conspiracy. The accused was guilty, however, of attempted conspiracy.

2. Agreement to Commit Multiple Offenses. *United States v. Pereira*, 53 M.J. 183 (2000). A single agreement to commit multiple offenses is a single conspiracy. The accused pled guilty to and was convicted of, *inter alia*, separate specifications of conspiracy to commit murder, conspiracy to commit robbery, and conspiracy to commit kidnapping. During an extensive providence inquiry, the accused consistently responded that he and his co-conspirators formed only one agreement to commit all the underlying offenses. Nothing in the record established separate agreements. The court held that there was only one conspiracy, as a matter of law, and it consolidated the three specifications into one specification.

3. Vicarious Liability. *United States v. Browning*, 54 M.J. 1 (2000). Even if a conspiracy is not alleged on the charge sheet, the government can prove charged offenses, which were actually perpetrated by a co-conspirator, by vicarious liability.

C. Solicitation. *United States v. Williams*, 52 M.J. 218 (2000). An express *or implicit* invitation to join in a criminal plan is a solicitation. The context in which an alleged statement was made can be considered to determine its criminal nature as a solicitation. The accused and the other person had used drugs together and the other person was informed of the accused's international drug smuggling operation, including use of another person for drug buying trips to Turkey for the accused. Therefore, the accused's statement, "Are you ready to go; you got your passport?", which the other person promptly answered with "I'm not going to go," could reasonably be construed as an invitation to join the previously disclosed criminal enterprise.

IV. MILITARY OFFENSES.

A. Disrespect. *United States v. Najera*, 52 M.J. 247 (2000). Courts can consider all the circumstances, including demeanor and context, when determining whether certain language was disrespectful behavior under Article 89, even if the specification alleged disrespect only in language and not deportment.

B. Disobedience.

1. Lawfulness of the Order. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000). Where CID was investigating the accused for writing numerous worthless checks to AAFES and civilian commercial establishments over an eight month period, the company commander's order to cease writing checks was a lawful order. The order had a valid military purpose, and it was not unduly restrictive of the accused's personal liberty.

2. "Ultimate Offense" Doctrine.

a. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000). A commander cannot order a soldier to obey the law and then punish the soldier for both the substantive violation of the law and disobedience of the order. Also, increasing the penalty for an offense it is expected the accused may commit is not a valid military purpose. However, where CID was investigating the accused for writing numerous worthless checks to AAFES and civilian commercial establishments over an eight month period, the company commander's order to cease writing checks was a lawful order. It was not an order to just obey the law; it proscribed all, not just worthless, checks. The order attempted to prevent further conduct that would negatively impact the accused, the unit, AAFES, and other commercial establishments. The order was necessary to promote the morale and discipline in the unit and was directly connected with the maintenance of good order in the service. The accused's defiance of her commander's order was the "ultimate offense" and could be separately charged and punished.

b. *United States v. Balcarczyk*, 52 M.J. 809 (N.M. Ct. Crim. App. 2000). The "ultimate offense" doctrine is a sentencing rule that limits the punishment for certain orders violations where the gravamen of the misconduct committed warrants a lesser punishment under another offense specifically enumerated in the MCM. The accused pled guilty to, *inter alia*, numerous specifications alleging violations of Secretary of the Navy Instruction 5300.26C, which prohibited conduct that is: (1) unwelcome; (2) sexual in nature; and (3) occurs in, or impacts upon, the work environment. The Navy-Marine court found that the gravamen of the accused's misconduct, which included many lewd acts at the barracks and on base, was the creation of a hostile environment, which differentiates the general order prohibiting sexual harassment from other sexual misconduct proscribed in the MCM (i.e. indecent exposure and indecent language in violation of Article 134). The court held that the accused was properly subjected to the greater maximum punishment authorized under Article 92.

C. Assault on a Noncommissioned Officer. *United States v. Diggs*, 52 M.J. 251 (2000). Assault on a noncommissioned officer, under Article 91, requires that the noncommissioned officer be "in the execution of his office." The victim may be subordinate in rank to the accused. SGT (E-5) V. returned home unexpectedly from Bosnia. He saw his wife emerge partially clad from their bedroom, and then he found the accused, SSG (E-6) Diggs, cowering naked in the bedroom closet. SGT V. struck SSG Diggs three or four times, until his wife stopped him. SSG Diggs admitted his wrongdoing and stated that he would turn himself in. SGT V. stated that he would accompany SSG Diggs to the MP station. On the way out of the building, SSG Diggs pushed SGT V. and ran away. The CAAF found the evidence legally sufficient, because a rational factfinder could find beyond a reasonable doubt that SGT V. was acting as an NCO in the execution of his office and not as an avenging cuckold.

D. Divestiture. *United States v. Diggs*, 52 M.J. 251 (2000). If a NCO commits misconduct that divests him of his authority as a NCO, he may regain his protected status by desisting in the illegal conduct and attempting to resolve the matter within appropriate channels. A rational factfinder could find that SGT (E-5) V., who struck SSG (E-6) Diggs after finding him naked with the sergeant's wife in their bedroom, regained his protected status as an NCO after he stopped the assault and informed SSG Diggs that he would accompany SSG Diggs to the MP station.

E. Maltreatment. *United States v. Fuller*, 54 M.J. 107 (2000). Sergeant Fuller, the accused, was a cadre member of the Inprocessing Training Center at Darmstadt, Germany, which conducted a 2-3 week inprocessing and orientation program for soldiers and their families. The accused and another platoon sergeant invited PFC M and PVT I to the accused's apartment. After they all drank, the other NCO and PVT I engaged in sexual intercourse in front of PFC M. When the accused returned to the room, he and PFC M engaged in sexual intercourse. PFC M testified that she willfully engaged in sexual intercourse and the accused had her permission. The accused told the other NCO, "You've gotta get some of this." The other NCO engaged in sexual intercourse with PFC M, and the accused engaged in sexual intercourse with PVT I. The accused was convicted of, *inter alia*, maltreatment of PFC M for "having sexual relations with her after she became extremely intoxicated and sexually harassing her in that he made a deliberate offensive comment of a sexual nature." Article 93 does not punish all improper relationships between superior and subordinates. Although she testified she was embarrassed, she never indicated that the accused used rank or position to threaten or intimidate her. The dominance and control that can be present in such senior-subordinate relationships was not present in this case. Also, the government failed to prove that the accused knew she was "extremely intoxicated," so the evidence was legally insufficient to prove maltreatment on that basis. As for the comment, under these circumstances, there was no evidence that it offended her. Embarrassment is not sufficient for maltreatment by sexual harassment. The court affirmed, however, a lesser-included offense under clause 1 or clause 2 of Article 134.

F. Clauses 1 and 2 of Article 134: Enumerated Offenses.

1. Opening Mail Matter. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). Opening another's mail knowingly and without authority, even with a purportedly good intention, is wrongful and violates Article 134. After pleading guilty to the offense of opening mail matter, the accused explained that his purpose in opening the package was to see whether the box had been misaddressed. The accused's professed selfless motive was immaterial, and it did not set up matter inconsistent with his plea.

2. Indecent Acts. *United States v. Tollinchi*, 54 M.J. 80 (2000). Sexual intercourse in the presence of a third person constitutes an indecent act, which is a lesser-included offense of rape.

G. Clauses 1 and 2 of Article 134: Unenumerated Offenses.

1. Clause 1 (Disorders and Neglects to the Prejudice to Good Order and Discipline in the Armed Forces).

a. *United States v. Diggs,* 52 M.J. 251 (2000). Being naked in a subordinate NCO's bedroom with that NCO's partially clad wife constituted an offense under clause 1 of Article 134.

b. Sexual Relations with Subordinate. *United States v. Fuller*, 54 M.J. 107 (2000). SGT Fuller, the accused, had sexual relations with a subordinate, PFC M. After he had sexual intercourse with her, he encouraged SFC Davis to also have sexual intercourse with her. Although the CAAF held that this conduct did not constitute maltreatment, under Article 93, the court had no doubt that it was prejudicial to good order and discipline or service-discrediting, and it affirmed a conviction of a lesser-included offense under Article 134.

2. Clause 2 (Conduct of a Nature to Bring Discredit Upon the Armed Forces).

a. Underage Drinking. *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000). The Coast Guard court held that openly drinking beer, while under the state drinking age of 21 and in the presence of civilians and other Coast Guard enlisted personnel at a party in the home of an underage civilian whose parents were not present, constituted conduct of a nature to bring discredit upon the armed forces in violation of clause 2 of Article 134.

b. Child Pornography. *United States v. Sapp*, 53 M.J. 90 (2000). After finding that the military judge failed to adequately advise the accused of the elements of federal offense of possession of child pornography, under 18 U.S.C. § 2252(a)(4)(A), which he was charged with violating under clause 3 of Article 134, the Air Force court did not err by affirming the lesser-included offense of service-discrediting conduct, under clause 2 of Article 134. The court affirmed the conviction for three reasons: the accused was on notice that he was charged with a violation of Article 134; the accused admitted his conduct was service-discrediting, even though it was not an element under clause 3; and both offenses were "closely related." *See also United States v. Augustine*, 53 M.J. 95 (2000) (applying the same rationale in a very similar case, where the Air Force court found the guilty plea to a violation of the federal child pornography statute was provident but the CAAF affirmed under clause 2 rather than clause 3 of Article 134).

H. Clause 3 of Article 134: Crimes and Offenses Not Capital.

1. Child Pornography.

a. *United States v. Murray*, 52 M.J. 423 (2000). In a prosecution for a violation of 18 U.S.C. § 2252(a)(2) by knowingly receiving sexually explicit depictions of minors that have been transported in interstate commerce, "knowingly" applies to the sexually explicit nature of the materials and the ages of the subjects. It does not oblige the Government to prove that the accused knew that the sexually explicit depictions passed through interstate commerce. The interstate commerce element is merely jurisdictional. The owner of the Internet service provider (ISP), from which the accused downloaded explicit child-sex files, testified that it received feeds from a larger out-of-state ISP, and a computer crimes expert testified that the accessed newsgroups were worldwide in scope and a user could not restrict downloaded files to files originating within the state. Therefore, the evidence was legally sufficient to prove that the depictions actually passed through interstate commerce.

b. *United States v. Augustine*, 53 M.J. 95 (2000). The CAAF *implied* that storing visual depiction in three or more computer files on the same computer did not constitute a violation of 18 U.S.C. § 2252(a). The Air Force court had affirmed the guilty plea to the offense under clause 3 (crimes and offenses not capital) of Article 134, but the CAAF affirmed under clause 2 (conduct of a nature to bring discredit upon the armed forces).

c. *United States v. James*, 53 M.J. 612 (N.M. Ct. Crim. App. 2000). The Navy-Marine court found that 18 USC § 2252A (Child Pornography Prevention Act) was neither facially overbroad nor vague. The accused downloaded and uploaded, on the Internet, numerous computer files containing pictures of minors engaging in explicit sexual activity. The court found that application of the statute in this case, where the accused admitted during his providence inquiry his belief that at least one of the persons in each of the photographs he possessed or transported was a minor, did not violate the First Amendment.

d. *United States v. Gallo*, 53 M.J. 556 (A.F. Ct. Crim. App. 2000). One of the elements of 18 USC § 2252(a)(4)(B) (Protection of Children against Sexual Exploitation Act) is that each of the alleged items of child pornography traveled in interstate commerce at or before the time the accused possessed them. Proof that the accused shipped or transmitted one of the alleged motion pictures in interstate commerce is not sufficient to prove that three or more of the alleged motion pictures transited interstate commerce.

e. *United States v. Wagner*, 52 M.J. 634 (N.M. Ct. Crim. App. 1999). The preemption doctrine prohibits application of Article 134 to misconduct already covered by Articles 80 through 132. The fact that misconduct may violate a federal non-capital criminal statute does not preempt the government from charging the offense under clauses 1 or 2, rather than clause 3, of Article 134, unless the language or legislative history of the federal statute specifically limits prosecution within a particular field or area to that statute. Nothing in the language nor legislative history indicates that Congress intended to completely occupy the field with 18 USC § 2252(a)(4)(A). Therefore, the preemption doctrine did not apply to a case where accused was charged and convicted, under clauses 1 and 2 of Article 134, for "wrongfully and unlawfully possess[ing] computer floppy disks and computer generated photographs, which contained visual depictions, when the producing of said visual depictions involved the use of minors engaging in sexually explicit conduct, and the visual depictions were of such conduct."

2. Federal Obscenity Statute. *United States v. Gallo*, 53 M.J. 556 (A.F. Ct. Crim. App. 2000). The Air Force court held that the proper community standard by which to determine if the materials the accused received via the Internet, by using his Air Force computer, were obscene, under 18 USC § 1462(a), was an Air Force community standard.

3. Federal Firearms Statute. *United States v. Ivey*, 53 M.J. 685 (Army Ct. Crim. App. 2000). The accused was charged and convicted of three specifications alleging violations of 18 USC § 922(a)(6) by being a "straw purchaser" of firearms. The statute prohibits, in connection with the acquisition of any firearm or ammunition, knowingly making to a false statement, intended or likely to deceive the firearms dealer with respect to any fact material to the lawfulness of the sale. One of the specifications involved a time when the accused took three friends with him to a gun shop. The group spent over an hour in the shop examining and test-firing various handguns. The dealer was aware that the friends could not purchase weapons because they were from out-of-state. The accused purchased three handguns with money that the dealer knew the three friends provided. The dealer explained to the accused how to transfer ownership on the registration documents. The accused completed the required ATF Form 4473, in which he asserted he was the "actual buyer" of the three handguns. The accused later confessed that he bought the guns for his three friends. The Army court reversed the conviction for that specification. It did not find that the statement was intended or likely to deceive the dealer, which is one of the elements of the offense.

4. Threat against the President. *United States v. Ogren*, 52 M.J. 528 (N.M. Ct. Crim. App. 1999). The offense of threatening the President under 18 USC § 871 has two essential elements: (1) the accused's words or actions constituted a true threat; and (2) the accused used those words, or took those actions, knowingly and willfully. A "true threat" means any contextually credible threat to kill, inflict bodily harm upon, or kidnap the President or his successor. It must have been reasonably foreseeable that the accused's statement would be taken as a threat by those to whom he made it. An actual intent to carry out the threat is not required. Evidence that the accused, while in pretrial confinement, stated to brig guards, "[F]--- the President. As a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard!" and "I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his f---ing brains out. . . . I'm going to find Clinton and blow his f---ing brains out," was legally and factually sufficient to support a conviction under 18 USC § 871.

V. DEFENSES.

A. Mistake of Law. *United States v. Ivey*, 53 M.J. 685 (Army Ct. Crim. App. 2000). The accused was charged and convicted of three specifications alleging separate violations of 18 USC § 922(a)(6) by being a "straw purchaser" of firearms. The statute prohibits, in connection with the acquisition of any firearm or ammunition, knowingly making to a false statement, intended or likely to deceive the firearms dealer with respect to any fact material to the lawfulness of the sale. The accused brought friends, who were unable to purchase firearms because of out-of-state residence or age, to a gun shop. He purchased firearms with money the friends gave him. The accused completed the required ATF Forms 4473, in which he asserted he was the "actual buyer" of the firearms. He later confessed that he bought the guns for his friends. The accused argued that he did not know what was meant by "actual buyer." The Army court called that a mistake of law, which was not a defense. Also, the court held, in line with federal courts, that the "knowing" requirement embraces a reckless disregard for the truth, as well as actual knowledge of the falsity of the statement.

B. Accident. *United States v. Davis*, 53 M.J. 202 (2000). The affirmative defense of accident requires that the accused was not acting negligently. Where the accused admitted that he was negligent by failing to properly secure his infant daughter in her car seat, the military judge did not err by failing to instruct *sua sponte* on the affirmative defense of accident.

C. Statute of Limitations. *United States v. McElhaney*, 54 M.J. 120 (2000). The statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial. Article 43 provides the applicable statute of limitations for courts-martial.

VI. PLEADINGS.

A. Sufficiency of Charges.

1. *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000). When the sufficiency of a specification is challenged for the first time on appeal, the specification is viewed with maximum liberality. The specification alleged that the accused "did, at Sturgeon Bay, Wisconsin, on or about 20 February 1999, consume alcoholic beverages while under the age of 21 years, in violation of Section 125.07 of the Wisconsin Statutes." The government proceeded under the theory that it was service-discrediting conduct in violation of clause 2 of Article 134. On appeal, the accused argued for the first time, that the specification lacked words of criminality and the alleged acts were not service-discrediting. The Coast Guard court held that the allegation that the acts violated state law constituted an allegation that they were unlawful.

2. *United States v. Harris*, 52 M.J. 665 (Army Ct. Crim. App. 2000). Where the government was unable to provide a more specific period of time, a specification alleging that the accused raped his stepdaughter sometime within a 23-month period was not so vague as to constitute a violation of due process.

3. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). A specification that alleged that the accused "was disorderly," but did not identify any specific acts, was not fatally defective. The military has followed the modern tendency toward allowing legal conclusions and eliminating detailed factual allegations. The three-prong test is that the specification must provide: (1) the essential elements; (2) notice to defend the charge; and (3) protection from double jeopardy. The only two elements are that the accused was disorderly and his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The accused did not object at trial and did not seek a bill of particulars. A challenge to a specification for the first time on appeal will be viewed more critically. Under these circumstances, the specification was sufficient to state an offense of disorderly conduct.

B. Joinder of Charges. *United States v. Duncan*, 53 M.J. 494 (2000). Joinder of offenses at a court-martial is more permissive than joinder in federal district courts. The accused was charged with the rape, forcible sodomy, and attempted murder of Ms. DR. He was also charged with the rape, forcible sodomy, and attempted murder of Ms. AM one month after the crimes against Ms. DR. The military judge did not abuse his discretion by refusing to sever the trial of the offenses. Under RCM 906(b)(10), the military judge may sever the offenses "only to prevent manifest injustice." Three factors used by the courts are the admissibility of evidence for certain offense to prove guilt of the other offenses; effectiveness of limiting instructions and bifurcation; and the likelihood of impermissible crossover. In this case, although the evidence concerning the crimes against each of the victims was not admissible for the crimes against the other victim, the military judge gave limiting instructions three times and bifurcated the presentation of evidence and argument. The court was confident that the members would be able to follow the instructions and consider the offenses separately.

C. Multiplicity.

1. Article 133. *United States v. Cherukuri*, 53 M.J. 68 (2000). Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser-included offense of conduct unbecoming an officer under Article 133. The accused, a lieutenant colonel, was found guilty of four specifications of indecent assaults upon four different women and one specification of conduct unbecoming an officer by abusing his position as a medical doctor to indecently assault the same four women. The military judge erred by not finding these offenses multiplicious, because the underlying acts of misconduct were the same.

2. Drug Offenses.

a. *United States v. Scalarone*, 52 M.J. 539 (N.M. Ct. Crim. App. 1999). Distribution of a controlled substance necessarily includes possession with the intent to distribute. Where accused possessed drugs with intent to distribute the entire quantity and he subsequently did distribute them, the offenses were multiplicious.

b. *United States v. Monday*, 52 M.J. 625 (Army Ct. Crim. App. 1999). The offenses of introduction of a controlled substance, with the aggravating factor of intent to distribute, and distribution of the same controlled substance are not multiplicious.

3. Indecent Liberties with a Child and Indecent Exposure. *United States v. Rinkes*, 53 M.J. 741 (N.M. Ct. Crim. App. 2000). Aware that a 12-year old female was watching from across the street, the accused stood at his window, unzipped his shorts, and masturbated. An adult female also saw the accused. Although the means of taking indecent liberties was accomplished, at least in part, by the indecent exposure, the specifications were not multiplicious. The "elements test" is met, because each offense requires proof of a different element.

4. Unauthorized Absences. *United States v. McGrew*, 53 M.J. 522 (N.M. Ct. Crim. App. 2000). A charge of unauthorized absence for one day was multiplicious with a missing movement charge.

5. Rape and Adultery. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). Rape and adultery allegations arising out of the same act of sexual intercourse are not multiplicious. Their factual components are inherently different. Rape requires force, which is not required for adultery. Adultery requires one of the actors to be married, which is not required for rape.

6. Waiver.

a. *United States v. Heryford*, 52 M.J. 265 (2000). An unconditional guilty plea or a failure to make a timely motion to dismiss waives a multiplicity issue, unless it rises to the level of plain error. An accused may demonstrate plain error by showing that the specifications are "facially duplicative," which means factually the same. This determination is made by reviewing the language of the specification and facts apparent on the face of the record. The accused pled guilty to possession with intent to distribute, introduction, and distribution of the same 12 doses of LSD. Although all three specifications allege "on or about 12 July 1997" at the same place, the stipulation of fact and plea inquiry established the accused possessed the LSD at his apartment for two days before the other two offenses. The specification and record permit a finding of possession independent from the introduction and distribution. The accused did not carry his burden of persuasion that there was plain error, so the multiplicity issue was waived.

b. *United States v. Ramsey*, 52 M.J. 322 (2000). Issues of multiplicity are waived by not making a timely motion and pleading guilty unconditionally, unless the offenses could be seen as "facially duplicative," which means factually the same. Even though specifications of solicitation and conspiracy both involved a telephone call the accused made to ask another marine to distribute LSD, the specifications were not "facially duplicative." The same act did not constitute the two offenses. The solicitation was complete with the telephone call, but the conspiracy still required the overt act. It is possible to have a solicitation without a conspiracy and a conspiracy without a solicitation.

c. *United States v. Scalarone*, 52 M.J. 539 (N.M. Ct. Crim. App. 1999). Where the accused possessed drugs with intent to distribute the entire quantity and he subsequently did distribute them, convicting the accused of both possession with intent to distribute and the subsequent distribution violated the Double Jeopardy Clause of the Fifth Amendment. The accused's failure to raise the issue of multiplicity at trial did not control this issue of constitutional dimension.

d. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). When multiplicity is not raised at trial, it is plain error for the military judge to accept a guilty plea only if the offenses are facially duplicative. Rape and adultery allegation arising form the same act of sexual intercourse are not facially duplicative.

e. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to separate specifications of indecent liberties with each child victim. The accused forfeited the multiplicity issue by not making a timely motion and pleading guilty unconditionally. Also, he failed to establish plain error, because the specifications were not "facially duplicative," as determined by reviewing the language of the specifications and the facts apparent on the face of the record.

f. *United States v. Balcarczyk*, 52 M.J. 809, 812 (N.M. Ct. Crim. App. 2000). The Navy-Marine court stated that, when the accused raises the issue of multiplicity for the first time on appeal, it will not apply forfeiture if the challenged offenses are facially duplicative, which means the specifications repeat each other as a matter of fact and the record demonstrates that they punish the same factual conduct. Once the court elects not to apply forfeiture, it examines the challenged offenses using existing principles in multiplicity jurisprudence to determine whether plain error exists. In this case, the accused was found guilty of several specifications under Article 92 for disobeying an instruction prohibiting sexual harassment, and he was found guilty of the corresponding sexual offenses under Article 134. The military judge found a significant number of the Article 92 offenses and Article 134 offenses to be essentially the same for the purpose of sentencing. For the first time on appeal, the accused argued that the military judge should have dismissed the Article 134 offenses as multiplicious. The Navy-Marine court did not apply forfeiture, because the offenses were facially duplicative. It found, however, no plain error. The offenses were not multiplicious. They were separate offenses, because they possessed distinct and separate elements.

D. Unreasonable Multiplication of Charges.

1. *United States v. Quiroz,* 53 M.J. 600 (N.M. Ct. Crim. App. 2000) (*en banc*), *certification for review filed* 53 M.J. 256 (2000). The prohibition against "unreasonable multiplication of charges," currently stated in the discussion to R.C.M. 307(c)(4), is a distinct concept from multiplicity. "[T]he longstanding principle prohibiting unreasonable multiplication of charges helps fill the gap, particularly after *Teters*, in promoting fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress." The Navy court provided the following 5 non-exclusive factors in determining whether the multiplication of charges and/or specifications is unreasonable:

1. Did the accused make the objection at trial?

2. Is each charge and specification aimed at distinctly separate criminal acts?

3. Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?

4. Does the number of charges and specifications unfairly increase the accused's punitive exposure?

5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

If, after considering these and other factors, the court determines that the "piling on" of charges is extreme or unreasonable, then it should grant an appropriate remedy (e.g. dismissal, consolidation, or consideration of the offenses as one for the purpose of sentencing) on a case by case basis.

Charging a violation of Article 108 by selling military property (C-4 explosive) and a violation of 18 U.S.C. § 842(h) by possessing, storing, transporting, and/or selling the same C-4 explosive was an unreasonable multiplication of charges.

The Navy court stated that, when the issue is raised for the first time on appeal, it would not apply forfeiture unless the accused affirmatively, knowingly, and voluntarily relinquished the issue at trial.

The Navy court also held that specifications alleging possession of marijuana seeds and possession of marijuana plants were both lesser-included offenses of the manufacture of marijuana.

2. *United States v. Butcher*, 53 M.J. 711 (A.F. Ct. Crim. App. 2000). The accused was convicted, *inter alia*, of wrongful possession of Perocet (a Schedule II narcotic), willful dereliction of duty by obtaining the Perocet without authorization, and larceny of the Perocet. Although not raised at trial, the accused argued that the military judge erred by not *sua sponte* dismissing the possession and dereliction charges as an unreasonable multiplication of charges, because they were based on or derived from the same acts that supported the larceny charge. The Air Force court held that failure to raise unreasonable multiplication of charges at trial waived the issue. While the court is not bound to apply waiver when it exercises its Article 66(c) powers, it will do so unless it finds an extreme or unreasonable "piling on" of charges, which it did not find in this case.

3. *United States v. Galante*, 53 M.J. 709 (N.M. Ct. Crim. App. 2000). The accused altered a promotion warrant. At some point over the next five days, he delivered it to his platoon sergeant for entry into the unit diary for pay purposes. The accused was charged and convicted of two separate specifications, under Article 123, for making and then uttering the forged document. The court held that the forgery specifications were not unreasonably multiplied, because they were aimed at distinctly separate criminal acts.

4. Applications of *Quiroz*.

a. *United States v. Rinkes*, 53 M.J. 741 (N.M. Ct. Crim. App. 2000). Aware that a 12-year old female was watching from across the street, the accused stood at his window, unzipped his shorts, and masturbated. An adult female also saw the accused. The accused's convictions of indecent liberties with a child and indecent exposure did not constitute an unreasonable multiplication of charges. There was no objection on this basis at trial. Considering the differing societal goals and victims, the specifications were aimed at distinctly separate criminal acts. The number of specifications did not exaggerate the criminality nor unfairly increase punitive exposure. Also, there was no evidence of prosecutorial abuse or overreaching.

b. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to and was convicted of separate specifications of indecent liberties with each child. The Navy-Marine court did not find that the specification represented an unreasonable multiplication of charges. The accused did not raise the issue at trial, and the specifications did not misrepresent or exaggerate his criminality, unfairly increase his exposure to punishment, or suggest any prosecutorial abuse of discretion in drafting charges.

c. *United States v. Balcarczyk*, 52 M.J. 809 (N.M. Ct. Crim. App. 2000). The accused was found guilty of several specifications under Article 92 for disobeying an instruction prohibiting sexual harassment, and he was found guilty of the corresponding sexual offenses under Article 134. The Navy-Marine court did not find that the charges were unreasonably multiplied, because the misconduct was beyond the typical indecent act, indecent language, and indecent exposure offenses. "The creation and perpetuation of this offensive and hostile environment eclipsed the individual indignities visited upon each victim."

E. Lesser-Included Offenses.

1. *Carter v. United States*, 120 S.Ct. 2159 (2000). Under the "elements test," the federal offense of bank larceny was not a lesser-included offense of the federal offense of bank robbery, so the defendant was not entitled to a jury instruction on it. A textual comparison of the elements of the two offenses in 18 U.S.C. § 2113 demonstrates that bank larceny requires three elements not required for bank robbery: (1) intent to steal; (2) asportation; and (3) value exceeding $1,000. Although, under the UCMJ, larceny is a lesser-included offense of robbery, the significance of this 5-4 decision is how a majority of the Court mechanically applied the "elements test" by comparing the statutory text.

2. *United States v. Davis*, 53 M.J. 202 (2000). Negligent homicide is a lesser-included offense of unpremeditated murder and involuntary manslaughter, because negligence is a "legally less serious element." When reasonably raised by the evidence, the military judge has a *sua sponte* obligation to instruct on lesser-included offenses. The accused's 9-month old daughter died of a head injury. The government charged the accused with unpremeditated murder, and its theory was that the accused killed his daughter by striking and shaking her. The defense theory was that she was fatally injured because she was not properly secured in her car seat when the accused swerved his car to avoid a traffic accident. The experts disputed whether the injuries could have been inflicted by the traffic accident. The defense counsel requested an instruction on involuntary manslaughter as a lesser-included offense. The military judge gave an instruction on involuntary manslaughter in the commission of an offense directly affecting the person (battery), under Article 119(b)(2). The defense did not request an instruction on negligent homicide, and it did not object to the instructions. The defense did not, however, affirmatively waive an instruction on the lesser-included offense of negligent homicide. Because the evidence raised the possibility that the accused negligently killed his daughter by shaking her or failing to properly secure her car seat, the military judge erred by failing to instruct the members on negligent homicide. The court reversed the conviction.

VII. CONCLUSION.